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IN THE
SUPREME COURT
OF THE
STATE OF UTAH
FILED

JAN 31 1952

ROBERT T. WAGNER and
REBECCA L. WAGNER,
his wife,

Appellants,

VS

JOSEPH A. ANDERSON,
Respondent.

Clerk, Supreme Court, Utah

Civil No. 7761

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

In view of the fact that Appellants' Statement of Facts includes certain allegations and contentions of Appellants therein denominated as Facts, which Respondent can not agree to, Respondent contends that the following are the essential facts for a determination of this appeal.

On August 11, 1951, Appellants filed a Complaint against the Respondent (Tr. 1) in which, among other things, they sought specific performance of a real estate contract, attorney's fees and special damages. On August 25, 1951, Respondent served upon Appellants a written notice of intention to proceed with the contract, and wherein he tendered to Appellants the purchase price for the property (Tr. 19).

On or about August 31, 1951, Appellants accepted the purchase price for said property and conveyed their interest therein to the Respondent. During the interval between said tender and conveyance negotiations were had between the parties in which Appellants' attorney stated Appellants would not dismiss the action unless the attorney's fee and damages were settled. Respondent's attorneys commented in substance that if the action were not dismissed the parties would be required to have the matter heard and determined by the Court.

On September 10, 1951, Respondent filed an Amended Motion to Dismiss (Tr. 12) which was heard on September 13, 1951, and granted by the Court, and a written Order of Dismissal made and entered on September 15, 1951 (Tr. 22). Thereafter, on September 19, 1951, Appellants filed a Motion for rehearing (Tr. 18) which was supported by Affidavits of W. W. Kirton, Jr. (Tr. 14) and Lothaire R. Rich (Tr. 16). Respondent filed a counter affidavit (Tr. 20). A hearing was had on said motion for rehearing which was denied by the Court.

STATEMENT OF POINTS

I

The Court did not err in dismissing the Complaint.

ARGUMENT

This is an action for specific performance of a real estate contract. Included in the Complaint is a claim for attorney's fees and special damage. After the Complaint had been filed Respondent served a notice on Appellants indicating his willingness to proceed with the contract, and wherein he tendered the purchase price to them. The Appellants accepted the purchase money and conveyed their interest in the property to Respondent.

Respondent contends that by accepting the purchase money and conveying the property Appellants' cause of action was extinguished and the attorneys' fee and damages, being mere incidents thereto, were likewise extinguished, and the Court had no further jurisdiction in the cause than to dismiss the action. If a tree falls because it is cut off at the roots the branches must also fall.

There is no question but what the Court may, under certain circumstances, award damages in lieu of specific performance, as indicated by the cases cited on Page 9 of Appellants' Brief, but in none of those cases was there a satisfaction of the specific

performance phase of the law suit and thus they are not in point so far as the question now before this Court is concerned.

Appellants apparently place great reliance on the case of Hall, vs. Great American Insurance Co. 252 N. W. 763, cited on Page 10 of their Brief. In the Hall case the claimant in an action against an insurance company for a fire loss dismissed a Complaint for everything in the policy, except that he reserved his right to claim a loss for a diamond stud, which claim the Court held he was able to pursue against the contention of the insurance company that he could not split his cause of action and pursue it piecemeal. The Hall case can readily be distinguished from the case at bar. In the Hall case the claim for the diamond stud was a part of the cause of action itself, and by dismissing the Complaint as to the other items the claimant merely eliminated them from the cause of action, but he still had a cause of action left with respect to the diamond stud. Whereas, in the case at bar the cause of action which the Appellants sued upon was for specific performance. The attorneys' fee and special damages were merely incidents thereof and were not separate items of a cause of action which could be sued upon alone. By acceptance of the purchase price and making a conveyance of the property the Appellants extinguished their cause. The claim for attorneys' fee and damages, being mere incidents thereto, were extinguished when the cause itself was gone. The authorities support this position.

A case very similar to the one at bar, in that it was a suit for specific performance, is that of *Dr. Shoop Family Medicine Co. vs. Showalter*, 98 N. W. 940 (Wis.). This was an action in equity brought to compel the specific performance of a contract. The Plaintiff claimed an Agreement had been made between Plaintiff and Defendant whereby for a commission of \$50.00 the Defendant was to purchase certain property in his own name for the Plaintiff. The Defendant purchased the property for \$1375.00, which sum the Plaintiff thereafter paid, but Defendant refused to convey the same to the Plaintiff. The Defendant filed a Counter Claim in which he claimed certain amounts were owing to him totaling \$175.00 and offered to convey the property upon payment of that sum. The matter was submitted to the jury for an advisory verdict. After the jury returned a verdict in favor of Plaintiff the Plaintiff moved for Findings and judgment in favor. The Defendant objected upon the ground that a settlement of the controversy had been had by the parties wherein the Plaintiff had paid the Defendant \$50.00 and the Defendant had delivered a deed to the property to him. In discussing this point the Appellate Court said on Page 941:

“We can not but regard this as a voluntary settlement of the controversy by the parties pending the litigation and the only remaining question is as to the effect of the settlement upon the litigation itself. Upon this question the conclusion of the trial Court seems to have been that there was a complete loss of jurisdiction and that the action can never be disposed of, but

must be left forever hanging between Heaven and earth like Mohamet's coffin. This was certainly an erroneous idea. Although there was no jurisdiction to try the controversy because the controversy had passed out of existence, still there was jurisdiction left in the Court to dismiss both the Complaint and the Counter Claim because the controversy had been settled. Where no controversy exists a court will dismiss the action for that very reason. Williams, vs. Williams, 117 Wis. 125, 94 N. W. 25. So while the Court was right in refusing to make Findings and Judgment for the Plaintiff upon its original cause of action it was wrong in holding that there was no jurisdiction in the Court to enter any judgment and wrong in denying the motion to dismiss the Counter Claim. Judgment should have been entered dismissing both the Complaint and the Counter Claim. There could be no costs properly granted to either party upon the dismissal, because both causes of action had been entirely extinguished by the settlement. Except in case of some express statutory provision an extinguishment of the entire cause of action by settlement pending the action with no mention of costs, extinguishes the right to costs. Geiser T. M. Co. vs. Smith, 36 Wis. 295, 17 Am. St. Rep. 494. Two Rivers Manufacturing Co. vs. Beyer, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131. Cernahan, vs. Chrisler, 107 Wis. 645, 83 N. W. 778. It seems best to reverse the entire order and direct the proper judgment." (Emphasis Ours.)

A case involving attorneys' fees and costs is Cloquet, vs. Department of Labor and Industries of

Washington, 268 Pac. 602 (Wash.). In this case the appellant sustained an injury in the course of his employment for which he claimed workmen's compensation. After monthly payments had been made the department attempted to terminate the amount of compensation by making an order to that effect, which was appealed from to the Superior Court. After the appeal had been taken the department made further arrangement for payment of monthly compensation and about a year later a settlement was made in which he was given an award of \$900.00. After the settlement had been made the appellant attempted to appeal from the first order wherein he claims that he should be entitled to attorney's fees and costs. The Appellate Court denied such recovery and discussed the question as follows:

“(2-4) Appellant also argues that, if his appeal was well taken the judgment of the court reversing the department would have allowed to him costs and attorneys' fees, and seems to contend that notwithstanding the settlement with the department by which he secured cancellation of its order and a reinstatement of his previous classification, with all of the benefits flowing therefrom, which he had accepted and retained, he may now proceed to trail, use that settlement as proof that the cancelled order was erroneous, and now recover his costs and attorneys' fees. Such a proceeding would be wholly inequitable. Moreover, when litigants compose their differences and wipe out the subject of the litigation, nothing being said about costs and attorneys' fees, it is to be presumed that each

party will bear his own, and in any event, when the subject matter of a lawsuit is by agreement of the parties finally and fully settled, the courts will not further retain jurisdiction for the purpose of deciding questions relating to costs.

“Judgment is affirmed.” (Emphasis ours.)

Another case which sets out the principle in unmistakable language is *Two Rivers Manufacturing Company, vs. Beyer*, 74 Wis, 210, 17 Am. St. Rep. 131, wherein it was held in an action to foreclose a tax lien where, during the pendency of the suit the Plaintiff accepted the full amount of the lien, that his cause of action was thereby terminated and that a judgment rendered thereafter for costs was void. In discussing that the Court says on Page 136:

“The tax certificates were the cause of action and the full cause of action of that suit of foreclosure. They are to be foreclosed in the same manner as mortgages (R. S. Sec. 1181) and are the cause of action the same as mortgages are the cause of action in suits of foreclosure. The redemption of the lands from the certificates pending the suit in foreclosure must have the same effect upon the suit as the payment of the mortgages or the redemption of the lands from the mortgages pending suits for their foreclosure. In both cases respectively the tax certificates and the mortgages are the subject matters of the suits. The sole object of the suits is to foreclose them and the sole result is the judgment of foreclosure. The suit is brought upon

them and on account of them alone . . . In all possible respects they are the same as any other cause of action such as a promissory note or a bond for the payment of money, for trespass or damage, feasant or any other which may be satisfied or discharged by the payment of money and for which a judgment may be rendered. There could be no action without such a cause or some cause of action. When such a cause no longer exists there is no longer any cause of action and the action is at an end. An action could not continue as an action when the cause has been removed, any more than an action could be commenced without a cause of action. The costs are merely incidental to an action based on a sufficient cause of action, and are not part of it, but the creature of the statute which can only follow a judgment or final determination of an action in which the cause of action is merged. An action can not be brought merely for the costs thereof, nor can an action be maintained after the cause of action has been removed merely for the costs thereof, for then they would be no longer incidental, but the principal of the suit. Can an action be commenced to foreclose a mortgage, or tax certificate, or on a note or bond, or for trespass after the mortgage or tax certificate has been redeemed, or the note or bond had been paid and the trespass satisfied and the money had been accepted by the Plaintiff? No more can such actions subsist and continue to a judgment after such redemption, payment or satisfaction had been acknowledged by the acceptance of the money. The action is ended when the cause of action is taken out of it."

Another case, *Obert, vs. Zahn*, 145 Pac. 403 (Okla.), was one for unlawful detainer. After the action was filed the Defendant yielded possession of the premises, which were accepted by the Plaintiff. The Appellate Court held that by Plaintiff having accepted possession of the premises the Court lost jurisdiction of the matter and had no power to enter judgment for possession or costs. The Court quoted the language from *Two Rivers Manufacturing Company, vs. Beyer*, *supra*. The Court also quoted from the case of *Geiser Threshing Machine Co. vs. Smith, et al*, 36 Wis. 295, 17 Am. St. Rep. 494, which is an action on a promissory note wherein attorneys' fees and costs were involved. The excerpt is as follows:

"The facts were that on March 17, 1873, summons and complaint in the action were delivered to the sheriff with intent to have the same served upon the defendant; that before service defendant paid plaintiff's attorney the principal and interest on the note in full, who accepted the money, but claimed \$17.00 costs; whereupon, defendant refusing to pay, a surrender of the note was refused upon that ground. Service was thereafter had. The note contained an agreement to pay plaintiff 5 per cent for attorney's fees if suit was brought thereon. On this state of facts there was judgment for plaintiff for costs, from which defendants appealed. In reversing the case the court said it was not necessary to decide when the suit was commenced:

"Because, whether it was commenced or not, the acceptance by the plaintiffs of full payment of the amount due on the note extinguished their right to prosecute it. It may be that the

plaintiffs might have refused the payment and prosecuted the suit to judgment for damages and costs. But they could not receive the damages and reserve the right to prosecute the suit for costs. *Canfield v. School District*, 19 Conn. 529; *Ayer v. Ashmead*, 31 Conn. 447 (83 Am. Dec. 154); *Buell vs. Flower*, 39 Conn. 462 (12 Am. Rep. 414)."

Many other cases are quoted in the Zahn case, and the Court concludes as follows:

"We are therefore of opinion, when pendente lite defendant yielded possession of the property in controversy, as he did, that there was left remaining no issue to try; that the court lost jurisdiction of the subject matter, and hence could render no judgment affecting the same, and there being no agreement as to the costs, erred in taxing the same against defendant."

CONCLUSION

The Court did not err in dismissing the Complaint, and its Judgment should be affirmed.

Respectfully submitted,

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